

Singh (Migration) [2019] AATA 3257 (26 March 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Kulwinder Singh
CASE NUMBER:	1704372
HOME AFFAIRS REFERENCE(S):	CLF2013/195591
MEMBER:	M. Edgoose
DATE:	26 March 2019
PLACE OF DECISION:	Melbourne, Victoria
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl.820.211(2)(a) of Schedule 2 to the Regulations; and • cl.820.221(1) of Schedule 2 to the Regulations.

Statement made on 26 March 2019 at 10:38am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine spousal relationship – joint bank account – sole beneficiary of superannuation – miscarriage – joint household – relationship with family members – social recognition – level of commitment – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 16 August 2013 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) because the delegate found there was insufficient evidence of the parties being in a spousal relationship.
5. The applicant appeared before the Tribunal on 5 March 2019 to give evidence and present arguments. The Tribunal also received oral evidence from Sharnie Kristin Brack, the applicant's wife and sponsor.
6. The applicant was represented in relation to the review by his registered migration agent.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

Whether the parties are in a spouse or de facto relationship

8. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3) of the Regulations, which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

10. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant provided the Department with a copy of the marriage certificate showing the marriage took place in Box Hill, Victoria, Australia on 24 June 2013 (DIBP Folio 257). On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

11. The applicant provided documentation to the Tribunal that was not submitted to the delegate. The Tribunal also had the benefit of hearing oral evidence from the applicant and the sponsor, and found both parties to be honest and believable.

12. Financial aspects of the relationship

13. The applicant provided oral evidence and documentation to the Tribunal regarding the financial aspects of the relationship. The applicant said to the Tribunal that he and his wife, the sponsor, have no joint ownership of real estate or other major assets, any joint liabilities and that neither the applicant nor the sponsor in the relationship owes any legal obligation in respect of the other.
14. The applicant informed the Tribunal that he and the sponsor have a joint Commonwealth Bank (CBA) account. The applicant stated that the sponsor works at a cheese factory in Braeside and earns just over AUD3,000 per month. The applicant stated to the tribunal that he is not able to work because he is on a Bridging Visa E with no work rights and that the sponsor is currently responsible for all the financial aspects of the relationship. The sponsor informed the Tribunal that she has two personal loans under her name with Cash Converters and Jacaranda Finance. The Tribunal notes that the joint CBA account is the extent of any pooling of financial resources of the couple, and financially things have been difficult, as the applicant has not been allowed to work due to his Bridging Visa conditions.
15. The sponsor stated that she has AUD9,000 in superannuation and that the applicant is the sole beneficiary.
16. The applicant stated that as he is not able to work the sponsor takes care of the day-to-day household expenses. The Tribunal notes that the sponsor pays for all of the day-to-day household expenses through her income from working at a cheese factory in Braeside. The applicant further stated that the household bills are shared with a housemate including grocery and utility bills. The sponsor informed the Tribunal that as the applicant is not able to work due to his visa conditions, finances are a struggle and that they are often late paying the bills and rent, but they get by. The Tribunal accepts the evidence provided.
17. The evidence submitted and the oral evidence provided at hearing about the financial aspects of the relationship indicates that both the applicant and sponsor were in a genuine and continuing relationship at the time of the application and at the time of this decision.

18. Nature of the household

19. The applicant stated that he and the sponsor have no children, however, they did have a miscarriage in 2015. The Tribunal finds no evidence that the parties have joint responsibility for the care and support of children.
20. The couple live together as a couple in a rented townhouse in the suburb of East Doncaster with one housemate where they share responsibility for the housework. The applicant stated

that he does the majority of the cooking and cleaning as he is always at home and the sponsor is currently on the afternoon shift for her work at the cheese factory. The applicant stated that the sponsor takes care of all the laundry and that together they do the grocery shopping.

21. The evidence of the nature of the household clearly indicates to the Tribunal that the applicant and sponsor are in a genuine relationship and have a life-long commitment to each other.

22. The social aspects of the relationship

23. The applicant and sponsor present themselves to other people as a committed and happily married couple. The applicant stated that he introduces his wife to other people as 'my wife'. The applicant informed the Tribunal that his wife, the sponsor, does not have a good relationship with his sister mainly due to cultural differences, however, the applicant's friends believe his wife, the sponsor, is kind hearted and they like her nature. The sponsor stated at hearing that she doesn't have any contact with her family and that she has been estranged from them for over nine years. The applicant further stated that their friends and acquaintances know about the nature of the relationship and believe that they have a strong and genuine relationship, and that they cannot be separated from each other.
24. The applicant and sponsor both stated that they plan and undertake a range of joint social activities together. The types of social activities that the couple do together are walks along the Mullum Mullum walking track in Nunawading and walks around the Cardinia Lake in the Dandenong Ranges. The couple stated that due to financial constraints they rarely go out for takeaway or to a restaurant and that the most recent time was for a kebab in the days prior to hearing.
25. The Tribunal accepts that the applicant and sponsor represent themselves to other people as being married to each other and that they plan and undertake joint social activities. The Tribunal accepts that the couple's friends and acquaintances know about the nature of the relationship.

26. The nature of the relationship

27. The couple first met in December 2011 at Strike Bowling at Crown Casino where they exchanged telephone numbers. At the time, the sponsor was living between houses in the Frankston and Seaford and was working part-time at a Fish-n-Chip shop. At this time, the applicant was living with his sister in Heathmont who is an Australian citizen. The couple started dating in February 2012. In late February the applicant introduced the sponsor to his sister. From this time the sponsor started staying over at the applicant's house in Heathmont.
28. During this time the applicant stated that he became an unlawful citizen for a period of one week in the early stages of the relationship. In July 2012 the applicant and sponsor became engaged. The couple married on 24 June 2013. Approximately six years later the couple are still married at the time of this decision and they have lived together for all of this time.
29. The couple have lived in shared houses and with the applicant's sister since they were married due to their financial situation. The couple no longer live with the applicant's sister.
30. The couple informed the Tribunal that they draw companionship and emotional support from each other by always communicating with each other and discussing any issues that may arise within their relationship. The couple have drawn constant companionship and emotional support from each other since the couple's miscarriage in 2015. The couple stated that they fully understand each other and never fight. The couple further stated to the

Tribunal that considering everything they have been through over the past six years they see the relationship as a long-term one. The Tribunal accepts the applicant's evidence.

31. Overall, considering all the evidence cumulatively, the Tribunal considers that the parties are in a married relationship and that they have a mutual commitment to a shared life to the exclusion of all others, and that the relationship between them is genuine and continuing and that they live together. Accordingly, the Tribunal is satisfied that the applicant and sponsor have established a level of commitment to one another and to their spousal relationship as contemplated by the Regulations.
32. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
33. Therefore the applicant meets cl.820.211(2)(a) and cl.820.221(1).
34. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

35. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl.820.211(2)(a) of Schedule 2 to the Regulations; and
 - cl.820.221(1) of Schedule 2 to the Regulations.

M. Edgoose
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).